Petition

81-1977

No.

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In the Supreme Court of the United States

October Term, 1981

EDWARD HODAKIEVIC,

Petitioner

vs.

CHARLES R. MARADO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To The

United States Court of Appeals

for the Sixth Circuit

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1973

EDWARD HODAKIEVIC,

Petitioner

vs.

CHARLES R. MARADO, et al.,

Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Edward L. Hodakievic, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above titled case on January 25, 1982.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Is it the public policy of the United States that absolute immunity from suit be conferred upon federal officials employed in non-judicial and non-prosecutorial jobs?

LIST OF PARTIES

EDWARD L. HODAKIEVIC,
Plaintiff-Petitioner,

CHARLES R. MARADO,

BILLY R. HENDERSON,

JOSEPH A. BENEVIDES, and

CHARLES H.MANES,
Defendants-Respondents

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OPINIONS BELOW

The Circuit Court of Appeals for the Sixth Circuit did not write an opinion. The judgment of the Circuit Court of Appeals is printed in Appendix A hereto, infra, page 25. The judgment and opinion of the United States District Court for the Northern District of Ohio, which, upon reconsideration, granted the respondents' motion for summary judgment, is printed in Appendix A hereto, infra page 27. The opinion and order of the District Court, which denied respondent's motion for summary judgment, is printed in Appendix A hereto, infra page 41..

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 25, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent text of these statutes and regulations shall be printed in Appendix A, infra, at the designated pages.

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STATEMENT OF THE CASE

From 1968 to March 12, 1974, plaintiff was a civilian employee of the United States Air Force, functioning as an industrial engineer at the Youngstown Air Reserve Base (Youngstown Municipal Airport). He was dismissed from his position for the reason that his supervisors allegedly found his work unsatisfactory. During the relevant time, and even after his civilian severance from the Air Force, plaintiff was on active duty with the Air Force Reserve (with the rank of major) and also stationed at Youngstown. Plaintiff pursued his administrative remedies within the Air Force, and was reinstated to his former position with full back pay. He commenced this suit in Trumbull County Common Pleas Court, however, to recover legal costs, attorney's fees and punitive damages.

This action is based on Ohio law. The primary theory of liability is grounded in the assertion that defendants, both his civilian supervisors and active reserve duty commanders, brought about his discharge through false, fraudulent and malicious statements of incompetency and unsatisfactory work. The case was removed by defendants to the District Court. Defendants filed a motion to dismiss the complaint, arguing that it fails to state a claim for relief because (1) defendants were cloaked with absolute immunity in the performance of their duties, and (2) the cause of action is barred by the applicable statute of limitations. The District Court treated the motion as one for summary judgment pursuant to Rule 12(b), Fed. R. Civ. R. and denied the motion. In denying the motion, the District Court relied primarily on Butz v. Economou, 438 U.S. 478.

Thereafter, the defendants filed a Motion for Summary Judgment asking the District Court to reconsider its prior ruling in the light of Granger v. Marek, 583 F. 781 (6th Cir. 1978), whereupon, the District Court granted summary judgment in favor of the defendants.

The plaintiff-petitioner then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment of the District Court, relying upon Granger v. Marek, supra.

The basis for federal jurisdiction in the District Court was 28 U.S.C. Sec. 1442(a), which gives the Court jursidiction over actions against federal officials allegedly acting within scope of their employment and/or under color of law.

ARGUMENT

In Butz v. Economou, 438 U.S. 478, the Supreme Court, citing Little v. Barreme, 2 Cranch (6 U.S.) 1970, stated:

> "A federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts."

The Court also cited Bates v. Clark, 95 U.S. 204 (1877).

In discussing Kendall v. Stokes, 3 How. (44 U.S.) 87 (1845) the Court discussed a situation involving a Postmaster General, among whose normal duties was the suspending of payments to creditors: The public official was not liable in damages "if he fell into error, provided, however, that he acted from a sense of public duty and without malice." (emphasis supplied).

The Court then refers to Wilkes v. Dinsman, 7 How (48 U.S.) 89, 131 (1949), a case involving military discipline wherein the defendant officer was exculpated "because of the failure to prove that he had exceeded his jurisdiction or had exercised it in a malicious or willfully erroneous manner." (emphasis supplied).

The Court then discussed Spalding v. Vilas, 161 U.S. 483 (1896): ". . .It did not purport to ignore limitations on their authority imposed by law."

Again, referring to Spalding and Barr v. Matteo , 360 U.S. 564, the Court said:

> ". . .Neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty. . ."

and that they would be accountable when they stray beyond the plain limits of their statutory authority.

The Court of Appeals was called upon, in Granger v. Marek, 583 F.2d 781 (1978) to

consider Butz v. Economou, supra. In that case, Internal Revenue agents were alleged to have committed common-law torts against the plaintiff, the same not being a violation of any constitutional rights of the plaintiff. It is an important distinction in Granger that no claim was made that the defendants had violated either a federal statute or any regulation of the Internal Revenue Service. In Footnote 4 of Granger, the Court noted:

> "A federal officer who acts outside his statutory authority could be held liable for tortions acts. See Butz v. Economou. . ."

Therefore, the Granger decision recognizes that absolute immunity did not apply to officials exceeding their statutory authority, and that Butz merely extended that rule to instances of officials who exceed their constitutional authority.

The general rule, then, is that federal officials are not entitled to absolute

immunity when they exceed the scope of their authority. This is true whether the authority is based upon the constitution, a congressional statute, or a regulation enacted purusant to federal statutory authorization.

The exception to this general rule is that absolute immunity applies to judges, prosecutors, and those officials performing quasi-judicial or quasi-prosecutorial functions. As Mr. Justice White states in Butz, supra "...adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages."

It is important to note that the above situation is the exception to the rule and

that the general rule is to grant only qualified immunity to federal officials. As was stated in Butz, supra:

> "The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.
>
> "***
> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> "'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the least, are cretaures of the law, and are bound to obey it.'"
>
> United States v. Lee, 106 U.S. 196, 220 (1882); Marbury v. Madison, 1 Cranch 137 (1803); Scheuer v. Rhodes, 416 U.S. 232, 239 - 240 (1974). In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."

The constitutional application of Butz is but an extension of the established rule regarding violations of express statutory limitations. Accordingly, the burden of showing that public policy requires an exemption of such broad scope as absolute immunity for acts exceeding statutory authority is upon the federal official.

In the instant case, all four (4) defendants are alleged to have committed "willful and malicious" acts:

1. Defendant Benevides is alleged to have executed a false statement under oath in connection with the plaintiff's proceedings to obtain reinstatement to his employment.

2. Defendant Marado is alleged to have set up improper standards for the plaintiff and to have caused false reports concerning plaintiff to be made in connection with plaintiff's reinstatement proceedings.

3. Defendant Henderson is alleged to have employed threats and intimidation to prevent plaintiff from obtaining witnesses to testify in connection with plaintiff's reinstatement proceedings.

4. Defendant Manes is also alleged to have employed threats and intimidation to prevent plaintiff from obtaining witnesses to testify in connection with plaintiff's reinstatement proceedings.

The Court of Appeals decided this case based on Granger v. Marek, supra. However, in the Granger Case the plaintiff did not claim that the defendants violated their statutory authority. The Court of Appeals was mistaken in its reliance on Granger because, in the instant case, the plaintiff-petitioner claims that the respondents did exceed their statutory authority.

In light of the claim that the resondents exceeded their authority and that they did not meet their burden of showing that public policy supports absolute immunity in

in this instance the Court of Appeals was in error in affirming the order of summary judgment.

The petitioner claims that the respondents exceeded their authority by violating the following statutes and regulations.

18 USC 1001 clearly makes it a crime, ". . . in any matter within the jurisdiction of any department or agency of the United States. . . to. . . knowingly and willfully . . . make any false, fictitious or fraudulent statements or representations . . . or make or use . . . any document knowing the same to contain any false, fictitious or fraudulent statement or entry . . ."

Air Force Regulation 30-30 - Attachment 3, Page 17, provides:

> "LAWS APPLICABLE TO ALL DEPARTMENT OF DEFENSE PERSONNEL"
> "The following activities may subject present and former DOD personnel to penalties.
> ". . .
> "12. The prohibition against fraud or false statements in a Government matter (see 18 U.S.C. 1001)."

AFR 30-30 bears the caption:

"Personnel"
"STANDARDS OF CONDUCT"

5 USC Chap. 23 sets up "Merit System Principles" which by virtue of the definitions contained in 5 USC 2101 ff. are applicable to the defendants herein.

5 USC 2301 (b)(8)(A) provides that employees should be "protected against arbitrary action."

5 USC 2302 sets forth "Prohibited personnel practices":

> "(a)(2) For the purpose of this section
> "(A) 'personnel action means -
> "(vi) a restoration
> "(x) any or significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

Subsection (b) of Section 2302 provides:

> "Any employee who has authority to take, direct others to take, recom- or approve any personnel action, shall not, with respect to such authority -

"(4) deceive or willfully obstruct any person with respect to such person's right to compete for such employment;"

"(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law; rule or regulation;

"(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule or regulation implementing, or directly concerning, the merit system principles contained in Section 2301 of this title."

Air Force Regulation 40-735 ("Civilian Personnel, CIVILIAN CONDUCT AND RESPONSIBILITY"), Sub-section 4 k (at page 3) prohibits "deceit in personnel actions."

Air Force Regulation 40-771 Sec. A4 (at page 3) contains express prohibition:

" . . . No supervisor or other person acting in an official capacity for the Air Force shall take, or threaten to take, any act of reprisal against an employee because he has exercised or

> expressed an intention to exercise intention to exercise any of his rights under this regulation . . . "

The plaintiff was employed by the Air Force in two (2) capacities: One as a civilian engineer and the other as a Major in the Air Force Reserve. His dismissal and subsequent reinstatement was in connection with his civilian employment with the Air Force.

In connection with his allegations against defendant Benevides (the First Count of the Complaint), the plaintiff submitted his affidavit that Benevides did not conduct an inspection (as he swore in the affidavit given in connection with plaintiff's reinstatement proceedings) thereby placing in issue the question of the defendant's violation of 18 USC 1001, Air Force Regulation 30-30 and also a violation of 5 USC 2302, Sub-section (b)(4) and Air Force Regulation 40-735.

In connection with his allegations against defendant, Marado (the Second Count of the Complaint) the plaintiff submitted the deposition of Robert W. Krisher, Sr., formerly the Civilian Personnel Officer at the Youngstown Air Force Base when the events involved took place. Mr. Krisher's testimony substantiates that defendant Marado improperly assigned the plaintiff to duties other than those to which he was officially assigned (Pages 7 and 42), hence a violation of 5 USC 2302 (a)(2)(A)(x): ". . . any other significant change in duties and responsibilities which is inconsistent with the employee's salary or grade level;" Mr. Krisher's deposition also substantiates that the defendant Marado did not follow Air Force Regulations in issuing reprimands to the plaintiff (which reprimands were also false and fraudulent) (Page 102).

In connection with his allegations against defendants, Henderson and Manes (Counts Three and Four of the Complaint) regarding their interference with his attempts to obtain evidence for use in his reinstatment proceedings, the plaintiff's affidavit places in issue the actions of the defendants by controverting their affidavits regarding the plaintiff's activities. The defendants gave orders to the plaintiff to cease and desist from engaging in civilian activities while on "active duty" with the Air Force Reserve thereby implying that he was engaging in such activities in violation of direct orders. These acts by the defendants threatened the plaintiff's status as a reserve officer and constituted intimidation. They violated 5 USC 2302(b)(4), (9) and (11) and also Air Force Regulations 40-735 and 40-771. If the statements of the defendants were knowingly false, the defendants thereby violated 18 USC 1001 and Air Force Regulation 30-30.

CONCLUSION

1.It is not the public policy of the United States that absolute immunity from suit be conferred upon federal officials employed in non-judicial and non-prosecutorial jobs. The Supreme Court held in Butz:

> "The extension of absolute immunity from damages to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees."

2. The defendants failed to establish that public policy requires that they be granted absolute immunity from suit. the Supreme Court held in Butz:

> "...federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."

There is no reason why the same burden of showing public policy should not apply to public officials who have violated express

prohibitions contained in statutes enacted pursuant to constitutional authority.

3. The decision of the Sixth Circuit Court of Appeals is contrary to the principles and precepts enunciated in Butz. Accordingly, the Supreme Court should reverse the decision of the Court of Appeals and remand this cause to the Appellate Court with instructions to order the vacation of the decision of the District Court and require that this cause be set for further proceedings on the merits.

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Appendix

APPENDIX A

No. 80-3776

UNITED STATES COURT
OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD L. HODAKIEVIC.	)	
	)	FILED
Plaintiff-Appellant,	)	Jan. 25, 1982
	)	
vs.	)	John P. Hehman,
	)	Clerk
CHARLES R. MARADO;	)	
BILLY R. HENDERSON;	)	ORDER
JOSEPH A. BENEVIDES AND	)	
CHARLES H. MANES,	)	
	)	
Defendants-Appellees	)	

BEFORE: ENGEL and MARTIN, Circuit Judges; COHN, District Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

IT IS ORDERED that the judgment of the District Court be, and it hereby is, affirmed, the Court being of the opinion

that this appeal is controlled by Granger v. Marek, 583 F.2d 781 (6th Cir., 1978).

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman

The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD L. HODAKIEVIC,	)	FILED
	)	Oct. 31, 1980
Plaintiff	)	
	)	No. C 76-223 Y
	)	
v.	)	
	)	JUDGMENT
	)	
CHARLES R. MARADO, et al.,	)	
	)	
Defendants	)	

LAMBROS, DISTRICT JUDGE

In accordance with the Court's order of this date, defendants' motion for summary judgment is granted against plaintiff Edward L. Hodakievic, and the complaint is dismissed.

This action is terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United Stateds District Judge

DATED: 10/31/80

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD L. HODAKIEVIC,	)	
	)	FILED
Plaintiff	)	Oct. 31, 1980
	)	
	)	No. C 76-223 Y
v.	)	
	)	
	)	MEMORANDUM
CHARLES R. MARADO, et al.,	)	OPINION
	)	AND ORDER
Defendants	)	

LAMBROS, DISTRICT JUDGE

This Court, having previously denied defendants' motion for summary judgment on the basis that their actions were subject only to a qualified immunity, is now asked to reconsider that ruling in light of Granger v. Marek, 583 F.2d 781 (6th Cir. 1978).

Plaintiff was dismissed as a civilian employee of the United States Air Force upon findings of his supervisors that his work was unsatisfactory. During the relevant

time, and even after his civilian severance from the Air Force, he was on active duty with the Air Force Reserve stationed at the same base where he had performed his civilian functions. He pursued his administrative remedies and was reinstated to his former position with full back pay.

He commenced this suit in the Court of Common Pleas of Trumbull County, Ohio to recover incidental and punitive damages, and the cause was removed to this Court pursuant to 28 U.S.C. §1442(a)(1), which confers jurisdiction over actions against federal officials allegedly acting within the scope of their employment or under color of state law. Named as defendants are Joseph A. Benevides, a civilian inspector employed by the Air Force; Charles Marado, the base Civil Engineer and plaintiff's immediaate civilian supervisor; Lieutenant Colonel

Billy R. Henderson, plaintiff's military Group Commander; and Lieutenant Colonel Charles H. Manes, plaintiff's military Squadron Commander. The complaint alleges that the defendants - civilian supervisors and action reserve duty commanders alike - having brought about plaintiff's discharge through false, fraudulent and malicious statements of incompetency and unsatisfactory work, had tortiously interfered with his business relationship. In Ohio, that tort is recognized as one falling within the broader concept of prima facie tort. See Byjpayee v. Rothermich, 53 Ohio App. 2d 117, 372 N.E. 2d 817 (1977).

Initial determination of defendant's motion to dismiss was made almost immediately after the United States Supreme Court rendered its decision in Butz v. Economou, 438 U.S. 478 (1978), holding that federal officials enjoy only a qualified immunity from liability where an invasion of

constitutional rights has been alleged. Although plaintiff had not alleged a constitutional violation, this Court found that Economou was persuasive authority for extending only qualified immunity to federal officials charged with a state tort. This Court was also mindful that Barr v. Mateo, 360 U.S. 564 (1959), imposed upon official immunity the limitation that the official's act must have been within the scope of his powers. Believing that the defendants were entitled only to qualified immunity and finding that there was a genuine issue of fact over whether defendants' written statements and reports were knowingly and maliciously filed, this Court denied their motion for summary judgment.

Subsequently, the Sixth Circuit clarified the applicability of Economou in Granger v. Marek, supra, holding in essence that a government official is absolutely immune from liability for common

law torts resulting from discretionary action performed within the scope of her duties. See also Miller v. DeLaune, 602 F.2d 198 (9th Cir. 1979); Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979). There being no issue raised as to the propriety of defendant's claim that they fall within the category of government officials who may claim immunity,1/ it remains for this court to decide whether there is any issue of fact as to whether defendants were acting within the scope of their duties when they took the actions complained of by plaintiff.

1/ "It is well settled that this absolute privilege is not an emolument of exalted office but is an expression of a policy designed to promote effective government ...and extends to lower federal officials." Malone v. Longo, 463 F. Supp. 139, 143 (E.D. N.Y. 1979), citing Barr v. Matteo, 360 U.S. 564, 572-73 (1959).

At the outset it must be noted that merely because a government official commits a tort does not mean that he is automatically acting beyond the scope of his authority, Granger v. Marek, supra, 583 F.2d at 785. This rationale was explained by Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (1st Cir. 1949) and cited with approval in Barr v. Matteo, supra, 360 U.S. at 572:

> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Thus, if the defendants can establish that their acts were within the outer perimeter of their lines of duty and were discretionary, they can claim absolute immunity whether or not plaintiff's claims of malice are true. Butz v. Economou, supra.

Considering first defendant Charles Marado, the base Civil Engineer, his job description discloses that his responsibilities included the evaluation of the quality and quantity of work performed by immediate subordinates and encompassed the discretion to take "action deemed necessary to effect improvements, if required." He was also charged with the development of standards and the delegation of work assignments to subordinates. Plaintiff alleges that Marado set up impossible standards for him to follow and that Marado further caused false statements to be placed in his personnel file

and made false and defamatory statements at his reinstatement hearing.
However, plaintiff has made no showing that Marado was acting as anything but a base Civil Engineer when he took the actions complained of. Rather than attacking the authority of similarly placed supervisors to carry out the functions performed by Marado, plaintiff takes issue with the manner in which the authority was exercised and the motive for which it was performed. It is this type of discretionary action taken within the outer perimeters of Marado's authority as base Civil Engineer that is protected by the absolute immunity outlined in Granger.

In the same way, defendant Benevides, as a member of an Inspector General inspection team evaluating the Industrial Engineer Section, prepared reports unfavorably evaluating plaintiff's performance. There is no question but what the preparation of the

report was required to use his discretion in preparing the contents of the evaluation. He is also cloaked with absolute immunity in the performance of this task.

Plaintiff argues that these two defendants could not have been acting within the scope of their authority inasmuch as they violated the express statutory restriction on that authority contained in 18 U.S.C. §1001, which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

This statute is not dispositive of the conduct at issue here. It was originally designed to protect governmental agencies from fraudulent monetary claims U.S. v.

Lambert, 470 F.2d 354 (5th Cir. 1972), vacated on other grounds, 501 F.2d 943 (5th Cir. 1974), and although it has been applied subsequently to non-monetary claims, its clear intent is to protect against those who through fraud and deception would seek to pervert the accomplishment of government objectives. See, e.g., Gonzales v. U.S., 286 F.2d 118 (10th Cir. 1960), cert. den. 365 U.S. 878 (1961). Violation of §1001 is not based on strict liability, but requires a specific intent to deceive or mislead the government, U.S. v. Lange, 528 F.2d 1280 (5th Cir. 1976). The record discloses a history of personal animosity between plaintiff and Marado which undoubtedly colored and affected Marado's evaluations, but is devoid of evidence that Marado intended to deceive the Air Force when he took what were in his view justifiable actions. The government did not seek to

prosecute either Marado or Benevides, and had they done so, they would have been thwarted by the very immunity at issue here which protects discretionary acts taken within the parameters of the defendants' authority.

Defendants Henderson and Manes are alleged to have used their positions as officers in the Air Force Reserve to interfere with plaintiff's attempts to obtain witnesses in his behalf at his reinstatement hearings. It is uncontroverted that these defendants ordered plaintiff to "cease from engaging in civilian activities which on reserve duty." It is further undisputed that a commanding officer is authorized to issue an order to a subordinate requiring him, to confine himself to military activities when on military duty, and for this reason alone the action

complained of falls within the scope of Henderson's and Manes' duties. In addition, plaintiff's argument that their conduct fell outside of the scope of their authority inasmuch as it violated Air Force Regulation 40-771(4) is unpersuasive. That regulation provides that a supervisor shall not take any reprisals against an employee who is using the appeal and grievance system to protect his rights, providing as a remedy an inquiry by management whether in fact such complaint has merit. Plaintiff not only fails to demonstrate how such an order constituted harrassment but can point to no regulatory language that wouuld hold such an order outside of the scope of the authority of the commander who issued it.

This Court therefore finds that all of the defendants named in the complaint were acting within the scope of their authority when they took the actions complained of.

This being the case, no genuine issue of material fact remains, and the defendants' motion for reconsideration of their denial of summary judgment is hereby granted.

IT IS SO ORDERED.

/s/ Thoams D. Lambros
Thomas D. Lambros
United States District Judge

DATED: 10/31/80

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD L. HODAKIEVIC,	)	FILED
	)	Sept. 15, 1978
Plaintiff	)	
	)	No. C 76-223 Y
	)	
v.	)	
	)	MEMORANDUM
	)	OPINION
CHARLES R. MARADO, et al.,	)	AND ORDER
	)	
Defendants	)	

LAMBROS, DISTRICT JUDGE

From 1968 to March 12, 1974, plaintiff was a civilian employee of the United States Air Force, functioning as an industrial engineer at the Youngstown Air Reserve Base (Youngstown Municipal Airport). He was dismissed from his position for the reason that his supervisors allegedly found his work unsatisfactory. During the relevant time, and even after his civilian severance from the Air Force, plaintiff was on active duty with the Air Force Reserve (with the rank of Major) and also stationed at Youngstown.

Plaintiff pursued his administrative remedies within the Air Force, and was reinstated to his former position with full back pay. He commenced this suit in Trumbull County Common Pleas Court, however, to recover legal costs, attorney's fees and punitive damages.

This action is based on Ohio law. The primary theory of liability is grounded in the assertion that defendants - both his civilian supervisors and active reserve duty commanders - brought about his discharge through false, fraudulent and malicious statements of incompetency and unsatisfactory work. The case was removed by defendants to this Court, however, pursuant to 28 U.S.C. §1442(a), which gives the Court jurisdiction over actions against federal officials allegedly acting within the scope of their employment and/or under color of law. Defendants have now filed a motion to dismiss the complaint, arguing that it fails to state a claim for relief because (1)

defendants were cloaked with absolute immunity in the performance of their duties, and (2) the cause of action is barred by the applicable statute of limitations. Because both sides have attached matters outside the initial pleadings, this motion must be treated as one for summary judgment. Rule 12(b), Fed. R. Civ. P.

At the outset, the Court notes that under Ohio law, the complaint states a cause of action for tortious interference with business relationships. In Ohio, that tort has come to be recognized as one falling within the broader concept of prima facie tort. See Byjpayee v. Rothermich, 53 O.App. 2d 117, 372 N.E. 2d 817 (Frank. Co. 1977), mot. to certify denied, _____ O. St. 2d. _____ (Sept. 29, 1977). The tort is defined as

> the intentional infliction of injury another without excuse or justification by an act which in and of itself may not be unlawful.

372 N.E. 2d at 820. The complaint clearly alleges that defendants' statements and written reports were known to be false and were knowingly and maliciously filed for the express purpose of causing plaintiff to lose his position. Thus defendants' assertions that the reports were submitted during routine and mandatory inspections is not a defense to a prima facie tort.

However, defendants claim that under federal law, they are absolutely immune from such claims arising out of the performance of their duties, even though state law may authorize the cause of action. Defendants rely primarily on Barr v. Mateo, 360 U.S. 564 (1959), and Mandel v. Nouse, 509 F.2d 1031 (6th Cir.), cert. denied, 422 U.S. 1008 (1975). Whatever efficacy those cases may have had here has been undercut by Butz v. Economou, _____ U.S. _____, 46 U.S.L.W. 4952

(June 29, 1978), which has recently held that federal officials enjoy only a qualified immunity from suit, unless their positions require unrestricted discretion (such as administrative law judges and "prosecuting" agency attorneys, see id. at 4960-63). Although the Court is aware that Butz v. Economou dealt only with the question of immunity where an invasion of constitutional rights has been alleged (which is not the case here), see id. at 4957 n.22, Butz v. Economou also makes clear that Barr v. Mateo and its progeny are not controlling.

In searching for the true meaning of the case, the Supreme Court concluded that

> Barr did not...purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers.

Butz v. Economou, supra, at 4955. And in distinguishing a case heavily relied upon by the government, the Supreme Court again emphasized:

> Spalding [v. Vilas, 161 U.S. 483 (1896)] did not involve conduct manifestly or otherwise beyond the authority of the official, nor did it involve a mistake of either law or fact in construing or applying the statute. It did not purport to immunize officials who ignore limitations on their authority imposed by law.

Id. at 4956. Indeed, Spalding v. Vilas, supra, which involved a postal employee's claim for damages due to the postmaster's circulation of adverse comments and subsequent interference with the employment relationship, would be further support for the underlying cause of action here. See Butz v. Economou, supra at 4956 n.19, quoting Barr v. Mateo, supra at 587 n.3 (Brennan, J., dissenting).

It would seem beyond cavil that the making of false statements or reports with the malicious intent of depriving someone of their livelihood is beyond the authority of any federal official. In fact, to do so may be a crime, see 18 U.S.C. §1001, and surely that provision is a limitation on an official's powers derived from controlling law. The complaint clearly alleges that defendants' conduct was outside the scope of their duties, and was intentionally malicious. Of course, on a motion to dismiss all well-pled allegations of the complaint must be taken as true. Thus the Court must conclude that this case falls within the exceptions to Barr v. Mateo and Spalding v. Vilas discussed above. Defendants can only assert a defense of qualified immunity, which means that defendants may still ultimately prevail if they demonstrate they made the uncomplimentary reports in good faith, honestly believing them to be true. Cf.

Procunier v. Navarette, _____ U.S.____, 55 L.Ed. 2d 24 (Feb. 22, 1978); Wood v. Strickland, 420 U.S. 308 (1975). But plaintiff must first prove all the elements of his case in chief to even require such a defense.

The Court is therefore not presented at this juncture with the question whether the statements and reports were made in good faith, or even whether in fact plaintiff's performance was unsatisfactory as compared to established job criteria. It is enough at this point that the affidavits of all litigants and the deposition of Robert Krisher clearly join issue on those two questions. There is a genuine dispute as to material facts, and defendants' motion, treated as one for summary judgment, must be

denied. 1/ Rule 56(c), Fed. R. Civ. P.; Felix v. Young, 536 F.2d 1126 (6th Cir. 1976).

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United States District Judge

Dated: 9/15/78

1/ As stated supra, the underlying cause of action is one for prima facie tort and interference with employment, which is neither libel and slander nor bodily injury. The applicable statute of limitations under Ohio law is thus O.R.C. §2305.09 (D), which allows four years to bring an action for "injury to the rights of the plaintiff not arising on contract nor [otherwise] enumerated...." Cf. Snevel, "The Prima Facie Tort and Interference with Plaintiff's Employment in Ohio," 51 O.Bar 407, 408 (Apr. 10, 1978). This action was commenced within that time period.

5 USCS §2101

§2101. Civil service; armed forces; uniformed serivces

For the purpose of this title [5 USCS §§ 101 et seq.]
(1) the "civil service" consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services;

(2) "armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard; and

(3) "uniformed services" means the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

5 USCS §2301

§2301. Merit system principles

(a) This section shall apply to

(1) an Executive agency;
(2) the Administrative Office of the United States Courts; and
(3) the Government Printing Office

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(8) Employees should be
(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

5 USCS §2302

§2302. Prohibited personnel practices

(a)(1) For the purpose of this title [5 USCS §§101 et seq.], "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section
(A) "personnel action" means
(vi) a restoratiion;
(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level; with respect to an employee in, or applicant for, a covered position in an agency;

(b) Any employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(11) take or fail to take any other personnel action violates ay law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title [5 USCS §2301].

18 USCS §1001

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. (June 25, 1948, ch 645, § 1, 62 Stat. 749.)

AFR 30-30 Attachment 3

LAWS APPLICABLE TO ALL DEPARTMENT OF DEFENSE PERSONNEL

The following activities may subject present and former DOD personnel to penalties:

1. Aiding, abetting, counselling, commanding, inducing, or procuring another to commit a crime under any criminal statute (see 18 U.S.C. 201).

3. Conspiring with one or more persons to commit a crime under any criminal statute or to defraud the United States, if any party to the conspiracy does any act to effect the object of the conspiracy (see 18 U.S.C. 371).

5. The prohibition against disloyalty and striking (see 5 U.S.C. 7311 and 18 U.S.C. 1918).

12. The prohibition against fraud or false statements in a Government matter (see 18 U.S.C. 1001).

15. The prohibitions against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of employment (18 U.S.C. 654).

AFR 40-375 Subsection 4(K)
(Changed to 4(L) by IMC 80-1)

K. Other Requirements. Other restrictions on employee conduct are too great in number to explain in detail here. They include bribery, misuse of Government vehicles, deceit in personnel actions, forgery of transportation requests, acting as agent for a foreign principal, and the like. Information on these requirements are in the Federal Pesonnel Manual, chapter 735.

AFR 40-771 Section A-4

4. Freedom from Reprisal of Interference

Unless an employee feels free to use the appeal and grievance systems provided in this regulation, these systems will not serve the intended purpose of giving the employee a means for review for his dissatisfactions. An employee and his authorized representative, therefore, must be free to use the systems without restraint, interference, coercion, discrimination or reprisal. No supervisor or other person acting in an official capacity for the Air Force shall take, or threaten to take, any act of reprisal against an employee because he has exercised or expressed an intention to exercise any of his rights under this regulation. To be fully effective, the spirit as well as the letter of the requirement must be enforced. It is not enough for an official to abstain from overt threats or interference. He must refrain from making any statement or taking any action that has the flavor of a threat, interference, or intimidation.

PROOF OF SERVICE

I, Seymour Gross, counsel for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of April, 1982, I served three (3) copies of the foregoing Petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington, D.C. 20530, and three (3) copies of the foregoing Petition for Writ of Certiorari upon Dennis Zapka, Assistant United States Attorney, Attorney for Defendant-Respondents, at 400 U.S. Court House, Cleveland, Ohio 44114, this 24th day of April, 1982, by mailing the same, in a duly addressed envelope, with first class postage prepaid.

Seymour Gross

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